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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-79

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

CHILDREN'S HOSPITAL OF PITTSBURGH,

Respondent.

On A Petition For Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Children's Hospital of Pittsburgh (hereinafter "the Hospital"), opposes the Petition for Writ of Certiorari filed by the Equal Employment Opportunity Commission (hereinafter "EEOC") for the reasons set forth herein.

OPINIONS BELOW

The opinion and orders of the District Court (App. A and B of Petition) are reported at 415 F. Supp. 1345. The opinion of the Court of Appeals for the Third Circuit (App. C of Petition) is reported at 556 F.2d 222.

JURISDICTION AND STATUTE INVOLVED

The jurisdictional requisites and statute involved are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964 require an employer to pay sick days to an employee on days she requested not to be scheduled to work due to pregnancy, even though no other male or female employees may be paid for sick days on days they are sick but not scheduled to work, regardless of the type of illness?

2. Was the Court of Appeals correct in holding "unpersuasive" the EEOC's argument that additional sick days could be paid by the Hospital from its operating fund without additional cost?

COUNTERSTATEMENT OF THE CASE

This litigation concerns Children's Hospital of Pittsburgh's paid sick leave policy, not its unpaid leave of absence policy.[1] This paid sick leave policy governs situations in which an employee may be paid when absent from scheduled work due to illness.

Under this policy, an employee is eligible for payment *only* if the employee was scheduled to work on the day of the illness.[2] If the employee is sick on a scheduled work day and has not already exceeded his or her allowance of sick days, the employee is eligible for payment, without regard to the employee's sex or reason for sickness, including pregnancy. (R. 102 l. 6-9, 107, 145 l. 1-4). No employee, however, is eligible for payment on a day he or she is not scheduled to work. (R. 103, 104, 110, 111, 147). This simple eligibility test—whether an employee is scheduled to work or not—is a sensible one in the hospital field since any other rules would cause confusion due to the complicated scheduling systems required and used because 24-hour medical care must be provided.

In this action, the EEOC has urged that pregnant employees, unlike men and women employees with any

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1. The Hospital's unpaid leave of absence policy, which allows a pregnant employee to establish her own last day of work and her own return date on the same basis as employees on leaves of absence for other reasons, is not at issue in this case. The EEOC has not contended that the Hospital's unpaid leave of absence policy is discriminatory.

2. (R. 99, 103 l. 2-4, 104, 110 l. 17-24, 111 l. 13-14, 118-19, 136 l. 15-20). References in this form are to the Joint Appendix used in the Court of Appeals.

other illnesses, must be paid for sick days on days they request not to be scheduled to work.

Harriet Baum, the charging party and the only employee whose claim is still at issue in this case, had worked at the Hospital 30 hours a week from her hire in August, 1968, until July 20, 1973. At that time she had accrued 166 hours of sick leave and 30 days of vacation time. After July 20 she was not scheduled because she had requested time off due to her pregnancy. In accordance with Hospital policy and her request, she was paid for her unused accumulated vacation time. She was not paid for sick days after her vacation ended on August 21, four weeks after the birth of her child, because she had requested not to be scheduled to return to work until the following November 30.

This was the same rule applied to all other employees and illnesses. The EEOC did not contest the testimony of Miss Wallace, Assistant Administrator of the Hospital since 1968, that no other employee—male or female, pregnant or not—is eligible to be paid for a sick day on a day the employee is not scheduled to work. (R. 103, 104, 110, 111). The EEOC also did not contest Miss Wallace's testimony that many female employees have been paid for sick days caused by pregnancy if they were sick on a scheduled work day.[3] Indeed, Ms. Baum

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3. THE WITNESS [Miss Wallace]: "Under this administration everybody receives the same treatment whether they are pregnant or not, and we have had many pregnant women who have been paid a considerable amount of sick time under this policy." (R. 102).

* * *

Q: [By Mr. Stoner]: "Now, if an employee, whether they are pregnant or not, is actually too sick on a day to work, on the day they are scheduled to work due to any illness, are they entitled to be paid for their accumulated sick days?"

A: [Miss Wallace]: "They are."

Q: "Is that the way that the Hospital sick leave policy is and has been administered as long as you have been in charge of it?"

A: "Yes." (R. 107).

* * *

Q: [By Mr. Stoner]: "Isn't it the case that, in fact, they can, a pregnant person can use a sick day even if they are disabled because of their pregnant condition if they are scheduled to work?"

A: [Miss Wallace]: "Yes, they get sick time all the time. If they are scheduled to work and are ill, we pay sick time to them—well, constantly." (R. 145).

was paid for one-half day of scheduled work she missed during the last month of her pregnancy. (R. 58-59). The EEOC offered no evidence to contest Miss Wallace's testimony that the eligibility rules for payment under the sick days plan had been applied equally to men and women and to all types of disabilities. (R. 102, 107, 118-19, 144-45, 147).

At trial, the EEOC sought $861 for Ms. Baum as the value of her unused sick days, monetary relief for a number of allegedly similarly situated persons, and an injunction. The EEOC contended that the Hospital's refusal to pay an employee who had requested not to be scheduled to work due to pregnancy was an "exclusion for pregnancy related disabilities" and that such purported exclusion violated Title VII, as interpreted by the Third Circuit Court of Appeals in *Liberty Mut. Ins. Co. v. Wetzel,* 511 F.2d 199 (3d Cir. 1975), before it was vacated on other grounds at 424 U.S. 737 (1976).

The District Court granted the Hospital's motion for a directed verdict as to the claims for monetary relief for the persons alleged to be situated similarly to Ms. Baum because, *inter alia,* the EEOC presented no evidence showing whether, or when, any of those persons were actually sick.

The District Court also acknowledged that no employee, male or female, pregnant or not pregnant, had ever been paid sick days on days he or she was not scheduled to work. In what the Hospital submits was clearly error, however, the District Court also concluded that the Hospital's denial of Ms. Baum's demand to be paid for her unused sick days on days she had requested not to be scheduled to work constituted disparate treatment—even though no other employee was treated differently:

> "The mere fact that defendant applied its sick leave policy equally to male, female, pregnant, non-pregnant employees is of no consequence if in the administration of said policy a protected class of employees is affected in a disparate manner." District Court Opinion; Petition for Certiorari at 6A.

Accordingly, the District Court entered an order requiring the Hospital to pay the EEOC $861 for Ms. Baum. It also issued an injunction which, the District Court later acknowledged, requires modification because it does not reflect the facts of the case.[4]

While this case was pending before the Court of Appeals, this Court rejected the EEOC's legal theory that a purported "exclusion for pregnancy-related disabilities" violates Title VII. *General Elec. Co. v. Gilbert,*

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4. See n. 9, *infra.*

429 U.S. 125 (1976). Nevertheless, the EEOC contended to the Court of Appeals that this Court's decision in *Gilbert* is distinguishable for one reason: additional sick days, the EEOC assumed, could be paid to pregnant employees at no additional cost to the Hospital. The Court of Appeals rejected that suggestion:[5]

> "In a reply brief the EEOC attempts to distinguish *Gilbert,* a distinction we find unpersuasive." Court of Appeals Opinion; Petition for Certiorari at 17A.

REASONS FOR DENYING THE WRIT

This case does not warrant review on certiorari because the decision of the Court of Appeals is in accord with this Court's prior decisions, no question of employer-forced involuntary leave of absence for pregnancy is involved, and this case is of limited importance since monetary relief for only one person remains in dispute. Moreover, the Petitioner has suggested no reason justifying review of this case, the Court of Appeals' ruling is correct for reasons in addition to those presented for review, and this case is a poor vehicle for this Court's review because the record does not support the factual assumptions upon which the EEOC's legal theories are based.

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5. The Court of Appeals found it unnecessary to reach the serious factual questions presented on appeal since, even on the EEOC's factual contentions, the EEOC's legal theory of the case had been rejected by this Court's decision in *Gilbert.*

I. THE EEOC's SUGGESTION THAT DISTINCTIONS EXIST BETWEEN BERG AND GILBERT IS NOT A REASON FOR GRANTING CERTIORARI IN THIS CASE.

In its Argument, Petitioner observes that a question in which it is interested is adequately presented to this Court in two other cases. *Satty v. Nashville Gas Co.,* 522 F.2d 850 (6th Cir. 1975), *cert. granted* No. 75-536; *Berg v. Richmond Unified Sch. Dist.,* 528 F.2d 1208 (9th Cir. 1975), *cert. granted* No. 75-1069.

This case, however, is fundamentally different from *Berg* and *Satty* since the Hospital does not force its employees to take an involuntary leave of absence due to pregnancy.

In addition, the EEOC's statement as to why this Court should not follow its decision in *General Elec. Co. v. Gilbert,* 429 U.S. 125 (1976), in the *Berg* case is not a statement of reasons why certiorari should be granted in this case. Instead, it is a mere statement of two ways in which the EEOC might distinguish *Berg*[6] from *Gilbert* and neither distinction is pertinent to this case.

A. The Hospital Does Not Require Employees To Take An Involuntary Leave of Absence For Pregnancy.

Unlike the employees involved in the *Berg* and *Satty* cases, Ms. Baum was not absent from work during her pregnancy due to an employer-forced leave of absence. Under the Hospital's leave of absence policy, which the EEOC has not contended is discriminatory, Ms. Baum was allowed to pick her own last day of work and her own prospective return date. She requested to work at

6. The EEOC does not state why it feels *Satty* might be distinguished from *Gilbert*.

her regular job through July 20, four days before her daughter was born, and she was allowed to do so. She then requested not to be scheduled to work until the return date she selected, November 30. In addition, she was paid vacation pay from the date she chose to stop working through August 21.

Unlike *Berg* and *Satty,* there has been no suggestion in this case that the Hospital forced Ms. Baum to miss working a single day she wished to be scheduled prior to her requested return date.

Furthermore, unlike *Berg* and *Satty,* there has been no suggestion that pregnant employees returning after a leave of absence are treated differently from employees on leaves of absence for any other reason. Similarly, no seniority questions are presented in this case.

Thus, the fact that this Court has granted a writ of certiorari in the *Berg* and *Satty* cases is no reason to do so in this case. In addition, neither distinction which the EEOC sees between *Berg* and *Gilbert* is pertinent to this case.

B. The Court Of Appeals Properly Rejected The EEOC's Claim That Payment Of Additional Sick Days To Unscheduled Pregnant Employees Would Be Cost Free To The Hospital.

The first distinction that the EEOC views as existing between the *Berg* and *Gilbert* cases is that sick leave should be treated differently under Title VII than an insurance plan because the sick leave plan in the *Berg* case "is an earned benefit from actual employment."

Although the EEOC does not directly assert that such a distinction is pertinent to this case, the EEOC suggested only one basis to the Court of Appeals for

distinguishing *Gilbert* from this case: that pregnant employees sick on days they were not scheduled to work could be paid sick days *cost-free to the Hospital.* Since that was the only distinction between *Gilbert* and this case urged by the EEOC to the Court of Appeals, it is proper to conclude that, if the "earned benefit" language in the Petition was intended to be a distinction between *Gilbert* and this case, it must be identical with the EEOC's position below that providing more benefits would be cost free.

There are at least four reasons why the Court of Appeals was correct in finding this proposed distinction "unpersuasive."

First, the suggestion that the abolition of the Hospital's rule that sick days may be paid only if an employee misses a scheduled work day would be cost free to the Hospital is simply wrong. To the contrary, the EEOC states in its Petition that, were this Court to adopt the EEOC's view, the Hospital would be required to pay $861 to Ms. Baum. Furthermore, it is not contested that monies to pay for sick days come from the Hospital's general operating fund, not from insurance or employee contribution. (R. 124). These facts prove conclusively that the Court of Appeals was correct in rejecting the EEOC's suggestion that payment of additional sick days would be cost free to the Hospital.[7]

7. Creation of new situations in which sick days would be payable would not be cost free since sick days now are payable only in certain events. For example, sick days—unlike vacation days—are not payable when an employee terminates his or her employment. (R. 102-03, 111-13). If, as the EEOC contends, the Hospital must now pay sick days to pregnant employees who voluntarily quit because they wish to raise a family, it will obviously not be free of additional cost to the Hospital.

Second, this case is a poor vehicle for testing the theory that all cost free benefits must be paid to pregnant employees under Title VII because the EEOC introduced no evidence at trial to support its position that the Hospital can pay additional sick days without cost. As this Court held in *Gilbert,* the plaintiff in a Title VII action has the burden of proof and this Court will not assume a pivotal fact if the plaintiff introduced no evidence concerning it. 429 U.S. at 137, n. 14.

Third, the EEOC has advanced no legal authority, either in the Court of Appeals or in its Petition to this Court, to support the proposition that Title VII requires that a Hospital must provide supposedly "cost-free" wages and benefits to pregnant employees even if the wages and benefits are given to no other employee. Moreover, if the EEOC's theory is that an "earned" benefit of employment is not provided by the Hospital because it does not pay employees who are sick on days they are not scheduled to work, each employee denied pay—male and female, pregnant or not—might have a cause of action for breach of contract, not for sex discrimination. In any event, the suggestion that the abolition of the Hospital's eligibility rules for payment for sick days will be cost free poses no legal question under Title VII since the statute does not require that "cost free" wages must be paid to pregnant employees if other employees are not so paid. Title VII requires only that those benefits which a Hospital can afford to grant, consistent with its primary obligation to provide quality medical care, are not given discriminatorily.

Finally, if the EEOC was intending to abandon its position that additional benefits would be cost free to the Hospital even though that was the only distinction

of *Gilbert* it urged to the Court of Appeals, the allegation that sick leave is an "earned benefit," using that phrase in everyday parlance, is no distinction at all between this case and *Gilbert*.

The Hospital's paid sick days plan is similar to the plans involved in *Gilbert* and *Geduldig v. Aiello,* 417 U.S. 484 (1974), in that it provides monetary payments to disabled employees who meet the eligibility requirements of the plan.

In this case, as in *Gilbert,* sick leave is given by the employer to attract and keep good quality employees. No benefits are given to persons of the community not earning them by employment with the employer. In each case the benefit is given because and in partial compensation for actual employment.

There is no basis for the EEOC's suggestion that General Electric's employees, any more than the Hospital's employees, did not earn the benefits provided to them by their employer. There simply is no basis for characterizing *Gilbert* as being limited to the supposed fact that the benefits given to General Electric employees under the insurance plan were not earned by those employees.

Even if that were a correct characterization of *Gilbert,* however, the EEOC has not suggested a single fact in the record of this case which shows that the Hospital's employees "earn" their benefits differently than did General Electric's employees.

Thus, the first distinction the EEOC sees between *Berg* and *Gilbert* is no reason for this Court to grant certiorari in this case.

C. The Hospital Does Pay Sick Days For Illness Due To Pregnancy; Employees Not Scheduled To Work Are Not Eligible For Payment, Regardless Of The Type Of Sickness.

The second distinction which the EEOC argues exists between *Berg* and *Gilbert* is that sick leave under the policy of the School District in *Berg* can, it is asserted, "be used for all other temporary disabilities" [other than those relating to pregnancy].

The EEOC does not state that the Court of Appeals erred in failing to recognize such a distinction in this case. Indeed, the EEOC never suggested to the Court of Appeals that it should consider such a distinction and, accordingly, it is not a proper reason for this Court to grant a Writ of Certiorari in this case.

In any event, however, this purported distinction between *Berg* and *Gilbert* is not applicable to this case. The EEOC's implication is that *Gilbert* does not control this case because in *Gilbert* there were other disabilities in addition to those related to pregnancy for which payment was not made. On the other hand, the EEOC would imply that, under the Hospital's plan, all pregnant employees are ineligible for payment of sick days while, in the same circumstances, all other employees with other illnesses are paid. This characterization of the Hospital's plan is not accurate.

The EEOC did not contest the testimony of Miss Wallace, the Hospital's Assistant Administrator, that the policy *does* provide payment to employees who miss work on a scheduled work day due to a pregnancy-related disability. The only pertinent situations under the

Hospital's policy in which there is an exclusion from payment is when any sick employee, male or female, pregnant or not, is not actually scheduled to work. Thus, many employees, of each sex and without regard to whether they are pregnant, are denied payment on days they are sick but not scheduled to work.

There simply is no exclusion from payment which is related to the type of illness suffered by the employee.

Indeed, Ms. Baum was paid for a sick day during the last month of her pregnancy and the fact that many other Hospital employees have been paid for sick days on scheduled work days missed due to pregnancy-related illnesses has not been contested. And certainly the Hospital's exclusions from its sick day policy are as numerous as General Electric's since all employees are excluded from receiving payments whenever they are not scheduled, including, for example, split days off, weekends, holiday, unpaid personal days off, vacation, and all types of leaves of absence.

Thus, the second distinction which the EEOC argues exists between *Berg* and *Gilbert* is not pertinent to the facts of this case because sick days are paid to employees sick due to pregnancy on the same basis as they are paid to employees with other illnesses. Accordingly, the two distinctions which the EEOC suggests exist between *Berg* and *Gilbert* are not reasons that the Court should review this case.

II. EVEN IF THIS COURT REVERSES GILBERT AS THE PETITION WOULD REQUIRE, THE COURT OF APPEALS' HOLDING IN THIS CASE WAS CORRECT.

The Hospital submits that it will require not only a decision in *Berg* and *Satty* favorable to the EEOC but also a reversal of *Gilbert* and *Geduldig v. Aiello,* 417 U.S. 474 (1974), in order to reach the factual and legal questions which would be presented in this Petition.[8]

Even if this Court were to reverse *Gilbert,* however, the Court of Appeals' decision was correct because (1) the EEOC did not show that there was a disparity between the Hospital's treatment of Harriet Baum and even one other employee, let alone any gender-based difference and (2) there is nothing in the record to suggest that the Hospital intended to discriminate.

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8. This Court stated, 417 U.S. at 496-97, n. 20, and it reiterated in *Gilbert,* 429 U.S. at 135:

> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups —pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."

Under the Hospital's program, sick employees are divided into two groups—employees who are scheduled to work and thus are eligible to be paid, and employees who are not scheduled to work and are, therefore, not eligible to be paid. The EEOC would take one sub-group of the ineligible employees—a portion, not even all persons of one sex—that is, those employees who are pregnant, and provide that only they may be paid when not scheduled to work. It would require more than a reversal of *Gilbert's* holding that this sub-group of one sex may be given lesser benefits to assert that this same sub-group is now entitled to special benefits.

On the first point, the Court of Appeals' decision was correct because the District Court erred as a matter of law in holding that discrimination existed if a pregnant employee was denied a request for sick days without comparing that denial to the rules applied to other employees. Indeed, the District Court agreed that there was no other employee who had ever been treated differently than Ms. Baum when it held:

> "The mere fact that defendant applied its sick leave policy equally to male, female, pregnant, nonpregnant employees is of no consequence if in the administration of said policy a protected class of employees is affected in a disparate manner." Petition at 6A.

The EEOC, however, did not introduce evidence of a single Hospital employee to whom the eligibility rules were applied differently than they were to Ms. Baum and the record shows that, under these sexually-neutral rules, many employees—including Ms. Baum—were paid for scheduled work days they missed due to a pregnancy-related illness.

Thus, even if the Court were to reverse *Gilbert,* the Court of Appeals' decision was correct since there was no sex-related difference in treatment.

Indeed, in a bond hearing in the District Court following the appeal, the trial judge acknowledged that he had misunderstood the Hospital's policy when he issued the injunction and would have changed it if it were before him again.[9] For this reason, too, the Court of Ap-

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9. MR. STONER: "[The injunction] said, 'from denying any female employee from using accumulated sick days for any pregnancy-related or child-

peals' order was correct and this Court should not grant the writ.

In addition, the Court of Appeals was correct because the EEOC introduced no evidence to show that the

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> birth disability upon proof and application of same' —without adding the phrase, 'on the same terms and conditions as it does for all other employees.' If that—"
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> THE COURT: "Well, that was certainly my intention." (R. 229).
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> * * *
>
> THE COURT: "A pregnant woman can't be given priority over other people who are sick, sore, lame or disabled." (R. 238).
>
> * * *
>
> THE COURT: "I didn't intend that a pregnant woman would have any more rights than anyone else. I said she is entitled to the same rights that any other employee of the Hospital has." (R. 239).
>
> * * *
>
> MR. STONER: "Now, it appears that [the injunction] gives female employees a superior right over that given to male and non-pregnant employees because there is no reference to the same terms and conditions as apply to men and non-pregnant employees."
>
> THE COURT: "If I had authority to do it, I would modify that injunction. All I can do is say it orally. I meant by that phrase and by that sentence that assuming that any other employee of the Hospital would be absent from their work regardless of why they were absent, man or woman, and they had accumulated sick leave, they were all to be treated the same and a woman that is pregnant and absent does not have any greater right or any lesser rights than all the other employees. That was my intention." (R. 242-43).

sick days plan was adopted or administered with the intent to discriminate.[10] Thus, the Court of Appeals was correct for reasons other than those suggested by the Petition.

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10. In *Gilbert,* this Court indicated that the standards of discrimination and the burden of proof in Title VII cases are the same as the standards applied under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. 429 U.S. at 145. This Court continued its discussion of the role of "intent" in discrimination cases in *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977). In *Arlington Heights,* this Court held, "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. Since that same standard is pertinent to a Title VII case, as the Court held in *Gilbert,* the EEOC's attempt to argue that the Hospital's plan is a "pretext" for discrimination must fail because the EEOC did not attempt to introduce any evidence to show that the Hospital had a discriminatory intent when it adopted the policy. As this Court held in *Arlington Heights,* the EEOC "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the [Hospital's] decision." 429 U.S. at 270.

III. THIS CASE IS NOT AN IMPORTANT ONE FOR THIS COURT'S REVIEW SINCE ONLY ONE PERSON'S CLAIM IS IN CONTROVERSY AND A DECISION WOULD PROVIDE LITTLE GUIDANCE FOR OTHER LITIGANTS.

This case is not an important one requiring this Court's review because the only monetary claim which would be affected is the EEOC's claim for $861 for Ms. Baum. The additional monetary relief the EEOC originally sought for the persons it alleged were situated similarly to Ms. Baum was denied by the District Court by directed verdict because the EEOC had failed to offer any evidence on, among other things, whether and when each person was allegedly disabled while not scheduled for work. The EEOC has conceded that it did not establish liability as to those persons[11] and no question as to the propriety of the District Court's grant of the directed verdict is preserved by the EEOC in its Petition. The small and limited monetary claim remaining is clearly not appropriate for this Court's review.

Furthermore, this case has little significance for other litigants unless this Court is prepared to hold (1) that Title VII deems sick days paid by an employer from its operating funds to be cost free to the employer and (2) that Title VII requires such cost free wages to be paid to pregnant employees on days they request not to be scheduled to work, even though other sick employees who are not scheduled are not eligible to be paid.

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11. Brief for the Equal Employment Opportunity Commission [in the Court of Appeals] at 16, 1.5-9.

CONCLUSION

For all the reasons set forth herein, Respondent, Children's Hospital of Pittsburgh, respectfully submits that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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